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CURRENT TOPICS.

It seems to us from the tone of the decision of the Supreme Court of Appeals of West Virginia, which we publish in this number, that its judges are "on their metal." We do not know how we would feel were we on the bench, but we believe that while the administration of justice should be beyond such criticism that it would bring it into public contempt, the judges should not be beyond the pale of public discussion. They are but public servants, controlling one of the three co-ordinate departments of one form of government. It has been said that the least danger to us exists in that department. We deny it. From the position which they occupy, the learning they are supposed to possess, the ability they command, the people are apt to have great forbearance, and accord to them that superiority and influence which may step by step make encroachments upon popular rights. The executive can rarely act except the legislature moves, but let them both agitate a public measure until agitation is exhausted, and then pass and approve it, and the judiciary can soon step in and show its power by declaring the measure to be improperly enacted or to be in conflict with the fundamental law itself. This illustrates the power they enjoy, and to say that a healthy administration of justice, *i. e.* faithful service by our judicial servants, rather our judicial rulers, is not promoted by free criticism of their acts, is to make a claim which cannot be said to be based upon logic. If a bill before the legislature be subject to criticism, why not a suit before a court, which is of great public importance? And, if the press of the day learn of something derogating to the honesty of the judges, e. g. that they are conducting their court in the interest of the party to which they belong, the people should know it, and, if it turn out to be false, they should not without trial by jury, condemn the publisher and editor of the zealous newspaper to pay fines or suffer imprisonment. It was their duty to publish the rumor for what it was worth, and if the judges imagine that by such action, they can "choke" discussion, the sooner the people acquaint them with a due sense of their relations to each other, the better it will be for both. We have known of wholesale charges of bribery made against the judges of the highest court of one great State, and it was free criticism which secured the ultimate proof of them. Judges are going too far when they declare that unfavorable criticism of their conduct or supposed conduct is a dangerous libel on justice. To be sure, a wholesale attack upon the administration of justice is calculated to bring it into contempt. The same may be said of the other departments. But occasional criticism by one from his sense of duty to the public, is something which should not be dealt with in the high-handed manner of a tyrant.

When any of our readers feel inclined to refuse to accept drafts upon them, they have need to be careful how they word their refusals. A drawee up in Iowa tried to be "smart" recently, and wrote across a draft "kiss my foot," signing his name, and from the report of the case of Norton v. Knapp, in 19 N. W. Rep. 867, he came as near being held to be an acceptor as comfort would seem to allow. He escaped, however, the court not feeling that "Kiss my foot" was synonymous with "I will pay," The rule is well stated by the court!

> The rule we understand to be, if the drawee does anything with or to the bill, or writes thereon anything which does not clearly negative an intention to accept, then he can or will be charged as an acceptor. The question then is what construction should be placed on the words 'kiss my foot,' written on the bill and signed by him? They cannot be rejected as surplusage. Such language is not ordinarily used in business circles or polite society. But by their use the defendant meant either to accept or refuse to accept the bill. It cannot be he meant the former, therefore it must be the latter. It seems quite clear to us that the defendant intended, by the use of the contemptuous, and vulgar words above stated, to give emphasis to his intention not to accept or have anything to do with the bill or the plaintiff. We understand the words, in common parlance, to mean and express contempt for the person to whom the words are addressed, and when used as a reply to a request, they imply, and are understood to mean, a decided, unqualified and contemptuous refusal to comply with such request. In such sense they were undoubtedly used when the defendant was requested to accept the bill. The question asked upon this point must be answered in the negative."

Some may say that this hot weather is calculated to make us "fussy," but we may beg leave to enter protest against any such conclusion. While we desire to remain on the most friendly terms with our contemporaries, believing that we can accomplish most with such a feeling towards each other, we still believe that the common courtesies should be extended to all. When one makes editorial comments upon anything, in this hot weather, and finds a week or two latter that they are taken *bodily* by a contemporary, without the slightest credit being given, he is apt to be found in that frame of mind when a good shower bath of cold water upon his "cranium" would be productive of agreeable results. It is fortunate for some one (he carefully preserves his *incog.*) that he resides as far away as Columbus or Cincinnati, O., as we would not undertake to promise what we would not do, if we could lay our hands upon him for taking bodily our comments upon the "base ball" decisions of Judges Baxter and Horner, and placing them in good bold type in the *Ohio Law Journal* and by implication, representing to his readers that he was the gifted (?) author of the lines. As this is the first time we have discovered our "Buckeye" contemporary, thus offending, we will forgive it, but if the offense is repeated, especially during the warm weather, we will —no matter—"just try it again."

GENERAL RESTRICTIONS ON BUSINESS FREEDOM.

I.

"Competition is the life of trade." This time-worn maxim is still heralded, and implicitly believed to be infallible by those who look at the matter in a superficial way. Freedom is the grandest *desideratum* to attain commercial prosperity, say those who give the matter no serious thought. Chief Justice Cooley has lately in discussing railway pools, both with reference to their legal aspect, and their effect upon the country, shown clearly that they may not only not injure, but actually benefit trade. There was a time in England when that nation was struggling to gain that commercial supremacy which she finally acquired, and set her heart against any restraints on commercial freedom, and denounced them through her judicial oracles in the strongest terms. Her mechanics were limited. Her merchants with capital were by no means overabundant. The population was comparatively small. The country was sparsely settled. Money was not so plentiful that a slight increase in the price of the nation's necessities, would not be remarked. In this condition of things, it was well that the country's judiciary should place its seal of condemnation upon all attempts by men claiming to be free-men, to restrict their freedom of action, when, by such action, competition was stifled, and the public exposed to the disadvantage of being compelled to comply with the demands of a probable monopoly. We cannot affect surprise that a conscientious judge, as Judge Hall must have been, should thunder out in French less elegant than expressive, when a contract by a dyer engaging to abstain from his craft for two years, was flaunted before him—"By God, if the plaintiff were here, he should go to prison till he had paid a fine to the King."[1] To sue on such a contract in those days, was like showing a bull a red rag.

Public policy demanded that all contracts in restraint of trade should be declared void, and that the interests of the public alone should be regarded. As an abstract rule, the conservative feeling of the bench has retained it, but as we shall see, as with most all the old rules, which were founded on common sense and experience, the exceptions have become so numerous that the old rule can be evaded almost entirely.

The reason of the rule, says Lord Bacon,[2] is that such a contract is "against the public good, deprives the party of his means of livelihood, enables masters to lay hardships upon their servants, and apprentices; and tends to oppression." Even so good a judge as Judge Maule,[3] while he admitted the general policy of the law, undoubtedly was that trade should

[1] Year Book, 2 Hen. V; Claggett v. Bachelor, Owen 143, Cro. Eliz. 872. See 6 Ind. 202. See Lange v. Werk, 2 Ohio St. 526, 527.

[2] Bacon's Abridgment, vol. 2, p. 299; Pierce v. Fuller, 8 Mass. 223, 224, (1811); Chappel v. Brockway, 21 Wend. 157, (1839).

[3] In Proctor v. Sargent, 2 Scott, N. R. 289, 302 (1840) 2 M. & G. 20.

be encouraged, "and contracts or agreements having for their object the restraint of trade" should be discouraged, declared that were the question *res integra*, he should "strongly incline to doubt whether the interests of commerce be really promoted by the prohibition of such contracts." "Many persons," he continued "who are well informed upon the subject, entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragement were held out to individuals to embark large capitals in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient."

But without any further discussion as to whether or not the rule was originally well founded or not, let us proceed, with the assumption that such has been the rule.

RULE 1.—All covenants which restrain the business or industrial freedom of the covenantors universally (A), or in a particular country (B), State (C), or in any considerable portion thereof (D), or between two countries (E), whether for all time, or only for a limited period (F), either absolutely or except on payment of tribute (G) are void, unless the business of the covenantee requires such restraint (H), or the contract be made to secure to each party the benefits of their joint industry (I), or to secure to the covenantor some advantage not otherwise obtainable (K), or the covenant does no more than to secure to the covenantee the exclusive custom of the covenantor, whether for a limited period (K) or for all time (L), or binds the covenantor to sell to or labor for the covenantee exclusively (M) the benefit being reciprocal, or is incidental to the sale of a patented invention (N), or secret process of manufacture or compounding (O), or the business be one but lately discovered, and likely to fail if not restricted (P), or the covenantor provide the covenantee with employment in the business during the period during which the restriction is to operate (Q), or the traffic to be abstained from is itself condemned by the policy of the State (R) or nation (S).

A.

Illustrations.

I. A covenants not to carry on a certain business at any place where B might carry on the same business. The covenant is too general, and is void.[4]

II. A covenants not to carry on the trade of brewer in S, or elsewhere. The covenant is void.[5]

III. A gives a bond conditioned that he shall never carry on, or be concerned in the business of foundering iron. The bond is void.[6]

IV. A contracts in consideration of his partner's buying out his share in the cabinet business, "to cease being in that trade." The agreement is void.[7]

The public interest demands that the trades and various commercial pursuits shall be open to competition. If the covenantees in cases I and II could restrain the covenantors according to the terms of the agreements, no reason can be given why they could not restrain two or five, or ten or all competitors in the same business. Viewed then in this light were such agreements recognized, organized capital could silence all competition, become the sole producer, and compel the people to be at its mercy. The public which maintains the administration of justice can never give cognizance to a blow aimed so directly at its weal.[8]

Such contracts as that mentioned in case III were said by the court to be void, because they injure the parties making them, diminishing their means of procuring livelihoods, and a competency for their families; because they tempt improvident persons for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; because they tend to deprive the public of the services of men in the employ-

[4] Thomas v. Administrator of Miles, 3 Ohio St. 274 (1854); Hedge v. Lowe, 47 Iowa, 137 (1877). *Quare* whether a contract not to engage in towing vessels in competition with the covenantees would be valid. Caswell v. Gibbs, 33 Mich. 331 (1876). See Gale v. Reed, 8 East 80 (1806); Mossop v. Mason, 18 Gr. Ch. (Ont.) 453, (1871); s. c. 17 Id. 360 (1870); s. c. 16 Id. 302 (1869). Kennedy v. Lee, 3 Mer. 440, 451, 452 (1817); Lange v. Werk, 2 Ohio St. 519 (1853).

[5] Hinde v. Gray, 1 M. & G. 195 (1840); s. c. 1 Scott, N. R. 123; 4 Jur. 392. Curtiss v. Gokey, 68 N. Y. 300, (1877); S. C. 5 Hun. 555 (1875); Saratoga County Bank v. King, 44 N. Y. 87 (1870); Peltz v. Evchele, 62 Mo. 171 (1876).

[6] Alger v. Thacher, 19 Pick. (Mass.) 51 (1837); Callahan v. Donnolly, 45 Cal. 152 (1872), in which party covenanted never to engage in yeast powder business.

[7] Maier v. Hoffman, 4 Daly (N. Y.), 268 (1871).

[8] See Mitchell v. Williams, 1 P. Wms. 181, (1717) pe Lord Macclesfield.

ments and capacities in which they may be most useful to the community as well as themselves; because they discourage industry and enterprise, and diminish the products of ingenuity and skill; and because they prevent competition and enhance prices, and thus expose the public to all the evils of monopoly.

B.

Illustrations.

I. L covenanted with W that he would not for a time specified be connected either directly or indirectly with the manufacture of stearin or star candles in any part of the United States. The covenant is void.[9]

II. A and B, partners in the business of manufacturing daguerreotype materials, dissolve, A agreeing that he will never be interested in such business in any part of the United States. The agreement is void.[10]

C.

Illustrations.

I. A steamboat company sells a steamboat, and the vendee agrees that the boat shall not be run on any of the waters of California for ten years. The covenant is void.[11]

II. A agreed with B never to "set up, exercise or carry on the trade or business of manufacturing and selling shoe-cutters at any place within the State." The contract is void.[12]

III. A binds himself not to engage in business of a particular kind "in the city or county of San Francisco, or State of California." The contract is void.[13]

The reasons underlying the judgments in these cases are the same as those which justified the previous rulings. Each State and country is a grand jurisdiction. It can legislate for itself. It knows not what privileges its citizens can enjoy in other States or nations, and it owes a duty to itself, to see that the freedom of its citizens is not abridged upon every foot of its soil whereon they may place themselves. Each State regards its own interests, and it is not for the interest of an independent nation or republic that its citizens should sell their industrial freedom for a mere "mess of pottage," and afterwards live as paupers, or be obliged to seek other trades or climes.

Said the court in case I, "The general principle which governs contracts in restraint of trade are well settled both in England and the United States. They proceed on the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecutions of trades, callings or professions, or from embarking in business enterprises in the promotion and encouragement of which the public has an interest. At an early period in English jurisprudence, when trade and the mechanical arts were in their infancy, it was deemed a matter of the greatest public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence the rule first established was that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite or unlimited period. But as population and trade increased, and there was consequently a greater competition in all useful pursuits, the necessity for the stringent rules which before prevailed had in greater measure ceased, and the rule itself was greatly relaxed and modified. Instead of denouncing as void all contracts in restraint of trade, the rule, as relaxed, tolerated such as were restricted in their operation within reasonable limits. Hence it has been repeatedly decided, both in England and America, that while a contract by an artisan not to follow his calling at any time or place was an unreasonable restraint upon trade, contrary to public policy, and therefore void, nevertheless if he contracted for a valuble consideration not to pursue his occupation within certain reasonable, restricted limits, the contract was valid and would be enforced."

"The law," says Chapman, J., in case II, "has always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by a grant from the sovereign to a particular individual of the sole right to exercise a par-

[9] Lange v. Werk, 2 Ohio St. 519 (1853).

[10] Dean v. Emerson, 102 Mass. 480 (1869).

[11] Wright v. Ryder, 36 Cal. 357 (1868). It will be well to compare this case with that of Oregon Steam Navigation Co. v. Winsor, 20 Wall. 67 (1873) where it seems the same agreement came before the United States Supreme Court and it held it to be valid, as being requisite for the protection of the vendor. This case will appear as illustration numbered III. under H.

[12] Taylor v. Blanchard, 13 Allen, 370 (1866), citing Mallan v. May, 11 M. & W. 653; Price v. Green, 16 M. & W. 346; Nicholls v. Stretton, 10 Q. B. 346, and distinguishing Alger v. Thacher, 19 Pick. 51.

[13] Moore v. Bonnett, 40 Cal. 251 (1870). Per Green, J. in West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 617 (1883).

ticular trade. The mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in *Magna Charta* * * * Another method by which monopolies were sought to be obtained was by private contracts, in which one of the parties agreed not to engage in some specified trade or business. The law, it is said, protects trade for the sake of the public, and not for the sake of the parties engaged in it."

D.

Illustrations.

I. A covenants not to carry on the business of manufacturing, or trading in palm-leaf beds or mattresses, directly or indirectly, in all the territory of the State of New York west of Albany. The agreement is void.[14]

II. A covenants with B that he will not carry on the perfume business within 600 miles of London. The covenant is void.[15]

III. A, in consideration of receiving instructions in dentistry and a salary from B, agrees that he will abstain from practicing over a district 200 miles in diameter. The contract is void.[16]

"That contracts in restraint of trade which embrace the entire kingdom or State, are void," said the court in case I. "is a doctrine coeval with the common law. It makes no difference whether the contract is or is not limited in repect of time. Whether the restraint be for one month or for life, if it be general and unlimited in respect to space, the contract is absolutely void and no circumstances whatever can justify or uphold it. The principles of public policy which lie at the foundation of this rule would seem to be too plain and obvious and yet we find it urged in many of the cases as an objection to the contract, that it tended to deprive the person bound of the means of obtaining a livelihood, as though the personal interests of the contracting party had something to do with the doctrine." In disapproving a *dicta* of Judge Bronson to that effect,[17] the court adds that "it is clear that the validity of the contract does not depend in the slightest degree upon the question whether it is beneficial or otherwise to the party bound. The interests of the public alone were considered in the adoption of the rule." The court declares the rule to be founded upon the importance of the freedom of every citizen to engage himself "in that department of labor in which his personal efforts will be likely to add most to the aggregate productions of the country" and upon the requirement of public convenience "that all the various trades and employments of society should be pursued each in its due proportion, a result with which the exclusion of any individual from his accustomed pursuits has a tendency to interfere." In answer to the contention of the plaintiff that the State of New York was but one of the many States of the Union, and that the defendant was free to act in the other States, and that no restraint would be general which merely confined itself to a single State, the court declared it to be "repugnant to the general fame and policy of our government to regard the Union, in respect to our ordinary internal and domestic interests, as one consolidated nation. For all these purposes, each State is a separate community with separate and independent public interests."[18]

Great stress is laid in cases like case II. upon the fact that the protection sought was greater than by any possibillity the covenantee could require, and the stronger the parties seek to make the contract the weaker it really becomes. The covenant if useless in its entirety to the covenantee is void in its entirety. Such was the case in case II.[19]

In case III. Tindal C. J. observed: The present case does not fall within the first class of contracts, as it certainly does not

[14] Lawrence v. Kidder, 10 Barb. 641 (1851). "Contracts, upon whatever consideration made, which go to the total restraint of trade, such as obligate a man not to pursue his occupation or exercise his trade any where in the State, are void. Such contracts are injurious to the public, and operate oppressively upon one party without being beneficial to the other.

[15] Price v. Green, 16 M. & W. 346 (1847).

[16] Horner v. Graves, 7 Bing. 735 (1831).

[17] Chappell v. Brockway, 21 Wend. 157.

[18] See Oregon Steam Navigation Company v. Winsor, 20 Wall. 67 (1873) in which Judge Bradley declares this country to be "substantially one country, especially in all matters of trade or business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State." See note 29.

[19] Ditchcock v. Coker, 6 A. & E. 438 (1837); Kellogg v. Larkin, 3 Pinney, (Wis.) 124 (1851); Ross v. Sadgbeer, 21 Wend. 157, 162 (1839), per Bronson, J.; Haws v. Preston, 9 Jur. (N. S.) 195 (1862); 32 L. J. Ch. 247; 11 W. R. 250; 7 L. T. (N. S.) 315; 32 Beav. 328; Chappell v. Brockway, 21 Wend. 157 (1839); Mallan v. May, 11 M. & W. 652 (1842); Lange v. Werk, 2 Ohio St. 528.

amount to a general restraint of the defendant from carying on his trade or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the plaintiff has ceased to practice. * * * And we do not see how a better test can be applied to the question whether the restraint is reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. * * * * No precise rule can be laid down as to the limit of the restraint. The nature of the business must be considered.

"It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man that a circle around York, traced for the distance of 100 miles, encloses a much larger space than can be necessary for the plaintiff's protection."

E.

Illustrations.

I. An ocean steamship company make a covenant with another not to run between the continents of North and South America. The covenant is void.[20]

The ocean is the national highway of commerce. To embark in commerce upon the high seas, and between the continents is enterprise which can but result in benefit to this country, and competition is but a stimulus of such enterprise. It is for our interest that transportation rates shall be as cheap as possible, that as many American vessels shall navigate the waters between the continents, and any contract of the terms of the one in case I. can have no other effect than to secure a different result. That was its object, and it is by no means out of place to presume that a contract will accomplish the result sought to be secured by the parties to it.

F.

Illustrations.

I. A sells out his inn at L to B and covenants with B that if he carries on business as an innkeeper within ten years, that he will pay B $4,000. The covenant is void.[21]

II. A covenants not to pursue the trade of a coal merchant for twenty years. The covenant is void.[22]

III. A sells out his manufacturing establishment to B and covenants not to directly or indirectly manufacture or sell any of the articles manufactured by the old company for a period of thirty years. The covenant is void.[23]

The public is to suffer no injury for the mere sake of enabling private parties to gain their ends. The only difference between contracts creating a perpetual restraint and those working a restraint for a limited period lies in the degree of injury. While the restraint operates it is presumed to be injurious. The public is deprived of the benefits of the industry or capital of the covenantor for whatever period contemplated, and it is that injury which secures the condemnation pronounced upon the covenant.

G.

Illustration.

I. A agrees, in consideration of being taught the art of scale-making, to pay to his instructor the sum of fifty dollars on every scale made for any other person than for such instructor by A, or by any other person in consequence of A's imparting information to him.[24]

"Admitting that the agreement in this case was founded on a sufficient consideration" said the court in case I. "is it reasonable to impose such a tribute upon the labor of a mechanic? Is not its direct tendency to restrain his skill in a useful art? And even if at law, damages might be recovered for breach of such a contract, ought a court of equity to enforce it?" According to the doctrine of the cases, these questions will admit of no answers that are favorable to the plaintiff. He was not

[20] Murray v. Vanderbilt, 39 Barb. 140; (1863). This was assumed to be law in this case.

[21] Mossop v. Mason, 18 Grant Ch. R. (Ont.) 453; (1871); s. c. 17 Id. 36 (1870); 16 Id. 302 (1869).

[22] Ward v. Byrne, 5 M. & W. 548, 562, (1839); 13 Jur. 1175.

[23] The Saratoga Co. Bank v. Bank, 44 N. Y. 87 (1870).

[24] Keeler v. Taylor, 53 Pa. St. 467.

the inventor and patentee of scales, selling his rights to another. Nothing of that sort appears in the case. It was a sale merely of his handicraft, and whilst the parties were free to fix their own valuation of that, a contract that restrained the industry of the defendant, not in a particular locality, but everywhere, not for a specified period, but for a lifetime, was contrary to public policy."

H.

Illustrations.

I. An attorney, whose business extends throughout England, sells the same to B, covenanting not to practice in England for twenty years. The covenant is valid.[25]

II. A, a publisher and printer in Michigan, whose business extends throughout the State, on sale thereof, covenants never to carry on, within the State, the same business. The covenant is valid.[26]

III. A agrees not to carry on the wine business for two years. The business of the promisee extends throughout England and Scotland, and business done anywhere in the kingdom will interfere with them. The agreement is valid, and is construed to exclude H from the kingdom altogether for the stipulated period.[27]

IV. A sells B a magazine and agrees to publish no other magazine of like nature. The agreement is valid.[28]

V. In the sale of a steamship the purchaser covenanted that he would not employ the ship for ten years in the waters of California. It was necessary for the welfare of the covenantee that such covenant should be made, and it would not have sold the steamer on any other terms. The covenant is valid.[29]

VI. A covenants never to engage in the manufacture of "Donnolly's Yeast Powders." The covenant is, probably, valid.[30]

VII. A, B and C, rival box and trunk makers, for the purpose of preventing the inconvenience and loss from all doing business in the same places, divide England into three districts, each taking one, and the other two engaging not to carry on any business in such district. The agreement is valid.[31]

"I confess," remarked the court in case I. "there is something in all contracts of this nature of which I have entertained a doubt. Where clients rely on the professional skill and knowledge of the individual they have long employed, I have some doubt as to the policy of sanctioning the purchase of their recommendation of their clients to other persons. These doubts have not originated with myself, because I recollect very well their being long dwelt upon, and commented on by Lord Eldon, not only in the case of a solicitor and client, but in the cases of medical men and their patients. I perfectly recollect a case in which the professional practice of one physician had been sold to another, wherein the policy of permitting such arrangements was the subject of great discussion and consideration. It is not, howevever, for me to act upon any doubts I may entertain of that nature, because agreements of this description have been too often sanctioned to be now questioned."

It was objected to the validity of the contract in case III, that there is a rule that contracts in restraint of trade to be valid, must be limited as to space, and that the contract in question not being in its terms unlimited as to space and therefore, extending to the whole of England and Wales, must be void. The court in repudiating such an absolute rule, stated that there were many trades which were carried on all over the kingdom; which by their very nature are extensive and widely diffused; that there were others which from their nature and necessities were local; that if the rule existed it would afford a complete protection to the latter class of trade while it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise; that if the rule existed it would apply in two classes of cases, those where the want of a limitation of space would be reasonable and those where it would be unreasonable, in the former class *i. e.* where the universality is unreasonable, the rule operating nothing, since by another rule, that the restraint must be reasonable, the contract would be void, while in the lat-

[25] Whittaker v. Howe, 3 Beav. 383, 394, (1841).

[26] Beal v. Chase, 31 Mich. 490.

[27] Rouisillon v. Rouisillon, L. R. 14 Ch. Div. 351, (1879); s. c. 49 L. J. Ch. (N. S.) 339; 42 L. T. N. S. 679; 28 W. R. 623, disapproving the *dictum* of Vice Chancellor Wickens in Allsopp v. Wheatcroft L. R. 15 Eq. 59, 64, and distinguishing Whittaker v. Howe, 3 Beav. 383, and Jones v. Lees, 1 Hurls. & Norm, 189.

[28] Ainsworth v. Bentley, 14 Weekly Rep. 630; Ingram v. Stiff, 5 Jur. (N. S.) 947. Presbury v. Fisher, 18 Mo. 50.

[29] Oregon Steam Navigation Co. v. Winsor, 20 Wall 67 (1873). See Wright v. Rider, 40 Cal., *ante* Illustration I. under C.

See Callahan v. Donnolly, 45 Cal. 152 (1873).

[31] Wicken v. Evans, 3 Y. & J. 318 (1829.)

ter class it operates, where it should not; that therefore, the rule lacked any support of reason.

"This country" says Bradley J. in case V. "is substantially one country especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid, a contract not to carry on a particular business within a particular State.[32] Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on the business; and that the latter shall not sell the article in New York where his associate is to reside and carry on the business. Can there be any doubt that such an agreement would be valid and binding?[33] Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

"There are two principal grounds upon which the doctrine is founded, that a contract in restraint of trade is void as against public policy. One is the injury to the public of being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family.[34] It is evident that both of these rules occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party. it is free from objection, and may be enforced."

The object of the parties in case VII. was to put an end to the great loss and inconvenience which each of the parties sustained by reason of their exercising the trade in the same places. "This is the mischief and evil recited in this agreement" it was said, "and what is the remedy they propose? Not a monopoly except as between themselves, because every other man may come into their districts and vend his goods. All they propose, is, that they shall not carry on a rivalry, nor continue any longer to trade throughout the country."

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[32] See remarks of Judge Selden to the contrary in Lawrence v. Kidder, 10 Barb. 641 (1841).

[33] This very case has arisen in Massachusetts, Stearns v. Barrett, 1 Pick. 442 (1823).

[34] See remarks of Judge Selden in Lawrence v. Kidder, 10 Barb. 641 (1851).

CONFESSION IN THE PRESENCE OF THE POLICE.

The case of Reg. v. Hatts,[1] again brings before the reader the vexed question as to the admissibility in evidence of a confession made to a prosecutor in the presence of the police. In the case referred to the prosecutor had taken the prisoner into his office, and there, in the presence of two police officers, said, "I presume you know who these gentlemen are." The prisoner said he did, and one of the officers then said, "We are police officers." Thereupon the prosecutor, addressing the prisoner, said, "I know what has been going on between you and Culffe for some time. You had better speak the truth." The prisoner then made a confession, and the question was whether it was admissible in evidence. The court held that it was not, the case not being distinguishable from Reg. v. Fennell.[2] In that case the confession was made under the following circumstances. Previously to being charged, the prisoner was taken into a room with the prosecutor and a police inspector. The prosecutor then said to the prisoner, "He" (meaning the inspector) "tells me you are making housebreaking implements; if that is so you had better tell the truth, it may be better for you." It was held that the statement made by the prisoner upon this was not admissible.

[1] 48 J. P. 248.

[2] 7 Q. B. D. 147.

The court did not, in either of these cases, deliver judgment at length. The ground of the decisions must, therefore, be sought in previous cases to which we proceed to direct the reader's attention.

In Reg. v. Baldry,[3] a number of old cases were overruled, and the law on the subject was fully discussed. In that case a police constable who apprehended a man on a charge of murder, having told him the nature of the charge against him, added that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him. The prisoner thereupon made a confession. It was held that the confession was rightly admitted in evidence. The ground of this decision was the general one, that a confession may be received in evidence so long as it is voluntary, that is to say, if it is not made in consequence of some inducement or threat held out or made to the prisoner by some person having authority over him in connection with the prosecution. As will be seen hereafter, a policeman is a person having authority for the purposes of this doctrine. It follows, therefore, that statements to a police constable, made voluntarily, or even in answer to questions by him, are, in general, admissible in evidence against the prisoner, but that they may be inadmissible if made in consequence of any inducement or threat made by the officer. In the case last mentioned, Pollock, C. B., pointed out that a simple caution by a constable to the accused to tell the truth, if he said anything, would not prevent the statement of the accused from being given in evidence; but that where the admonition to speak the truth was coupled with any expression importing that it would be better for the accused to do so, the statement could not be admitted, the expression amounting to an inducement to confess. It will be observed, on comparing this judgment with the two recent cases referred to in the earlier part of this article, that words to the effect that it would be better for the accused to tell the truth were held to prevent the statement made in reply from being admitted in evidence.

In Reg. v. Sleeman,[4] a maid-servant, under a charge of setting fire to a farm building belonging to her master, was given into the temporary custody of a married daughter of her master, who did not live in the house and had no control over her as a mistress. She had been given into the custody of a policeman, and the officer had given her leave to change her dress, on the understanding that while doing so she was to be in the charge of the married daughter of her master, as already stated. While they were alone together the daughter said to the prisoner, "I am sorry for you, you ought to have known better; tell the truth whether you did it or no," and upon the prisoner replying, "I am innocent, added "don't run your soul into more sin, but tell the truth." The prisoner then confessed. Barke, B., admitted the confession in evidence. He held that the words used did not amount to a threat or inducement, nor were they used by a person in authority. For the purposes of this article the reader may be asked to consider what the result would have been had the words been used by the policeman. It may be inferred that the statement would equally have been receivable. The words were no more than an exhortation to tell the truth. They held out no promise that it would be better for the prisoner if she did so. This case is therefore quite consistent with those already mentioned.

In Reg. v. Bate,[5] the prisoner was charged with having concealed the birth of her child. Being questioned by a police constable gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie." It was held by Montague Smith, J., that a further statement thereupon made by the prisoner to the constable was inadmissible in evidence against her. This case clearly follows the previous decisions.

In an Irish case,[6] the prisoner was charged with murder. After he was taken into custody he was told by the police constable in whose charge he was that it would be better for him to tell the truth, and not to put people to the extremities he was doing. This happened at ten in the morning. At six in the evening of the same day another constable who was in charge of the prisoner in answer to a request by the prisoner to see his father, cautioned him not to say anything to crimin-

[3] 2 Den. C. C. 430.
[4] 6 Cox C. C. 245; 23 L. J. M. C. 19.
[5] 11 Cox C. C. 686.
[6] Reg. v. Doherty, 13 Cox C. C. 23.

ate himself, for that anything he might say would come in evidence against him. A confession made to the latter constable was rejected by Whiteside, C. J. He said: "If a person in authority—and it has been decided that a constable, having a prisoner in charge comes within that definition—makes use of the expression proved to have been made to this prisoner, 'that it would be better for him to tell the truth,' it is as clear as light that any admission or confession afterwards made, under the influence of that inducement, should not be received." And he considered that any subsequent caution such as had been given must be shown to have had the effect of removing from the prisoner's mind all hope or expectation of gain or favor to be derived from the making of the confession. This is a very strong case, but it seems to be strictly in accordance with the principles laid down by the earlier decisions.

It has already been stated that in order to exclude a confession made to or in the presence of a police constable there must have been something in the nature of an inducement or a threat held out or made by the constable or in his presence. A mere exhortation to speak the truth has been shown not to amount to an inducement when made by a person not having any authority over the prisoner in connection with the prosecution. And it seems that such an exhortation, even if made in the constable's presence does not amount to an inducement. Thus in Reg. v. Jarvis,[7] the prisoner was called up by his master and told: "You are in the presence of two police officers, and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." The master afterwards added, "Take care, we know more than you think." The prisoner thereupon made a statement. It was held that such statement was receivable in evidence against him on his trial for larceny. Kelly, C. B., said that the words "You had better tell the truth," seemed to have acquired sort of technical meaning importing either a threat or a benefit. But they had not been so used. All the master had said consisted of warning or advice to speak the truth on moral grounds, which was not enough to exclude the statement made in consequence of it. This case was followed in Reg. v. Reeve and Hancock.[8] There the prisoners, two children, one aged eight and the other a little older, were charged with attempting to obstruct a railway train. It was proved that, the mothers of the prisoners and a policeman being present, after they had been apprehended, the mother of the prisoners said "You had better, as good boys, tell the truth," whereupon both the prisoners confessed. It was held that the confession was admissible in evidence. From the fact that the court professed to follow Reg. v. Jarvis, *supra*, it would seem that they looked upon the words "as good boys," as showing that the whole of the advice given to the boys was in the nature of exhortation on moral grounds.

In the foregoing remarks we have confined our attention to such of the cases as had reference to the effect of the presence of a policeman. But such presence is no ground of distinction. All the cases as to confessions depend upon the same principle, and a policeman is only one of many persons who may have authority over a prisoner, and to whom the principle applies. We may conclude our remarks on the subject with a statement of this principle in general terms as given by Stephen, J., in his work on Evidence,[9] where he says: "No confession is to be deemed to be voluntary (and therefore admissible) if it appears to the judge to have been caused by inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against him, whether addressed to him directly, or brought to his knowledge indirectly; and if, in the opinion of the judge, such inducement, threat or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. But a confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority."—*Justice of the Peace.*

[7] L. R. 1 C. C. R. 96.

[8] L. R. 1 C. C. R. 362.

[9] At p. 28.

CONTEMPT — CONSTRUCTIVE — ATTACHMENT HOW ISSUED—CONSTITUTIONAL LAW—POWER OF COURT—VIRGINIA AND WEST VIRGINIA—WHAT AMOUNTS TO A CONTEMPT.

IN RE FREW AND HART.

Supreme Court of Appeals of West Virginia, July 8, 1884.

1. While the usual course in cases of constructive contempt is to issue a rule to show cause why attachment should not issue, and such a rule is based on affidavit, this court may on its own information, or on the unsworn statement of a member of the bar, in cases where the facts are clear and unmistakable, such as contemptuous publications in a newspaper, issue such attachment.

2. When thus issued though it may be defective in form or substance, yet if the defendant appears and answers, admitting facts sufficient to constitute the offense alleged against him, the court will not regard objections to the proceedings for the want of an affidavit or sworn statement, or on account of defects in the rule, though the objection is made in his answer.

3. This court has the constitutional power to punish as for contempt the publication of a libel on the judges thereof, acting in their judicial capacity, made during the term of the court, with reference to a case then pending and undecided.

4. The act of the Virginia Legislature of 1831, in reference to punishment for contempt of court, which has been handed down through successive codes, and is now found in Chapter 147 of the Acts of this State, was not intended and does not apply to the Supreme Court of Appeals.

5. A publication in a newspaper in the city where this court is sitting, with reference to a case then pending and undetermined, charging three of the four judges of the court with attending a political caucus more than a year before, and advising the action out of which the case arose, and promising the caucus to hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention, for political purposes, is a contempt of said court which it may summarily punish.

JOHNSON, President, delivered the opinion of the court:

We are well aware that the trust reposed in us to protect the people's court from degradation, is delicate as well as sacred. The power claimed, it is said, is arbitrary and liable to abuse. Tha is no reason why the power should not exist and be reposed somewhere, and the few cases in which it has been used in a century shows it is not unsafe in the hands of the courts. It is well established by the authorities that the power is inherent in courts of justice to punish constructive as well as direct contempts, and in this country, where the courts are in the divisions of power by the Constitutions of the several States, constituted a separate and distinct department of government, clothed with jurisdiction and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them can not be taken away by the legislative department of the government. * * * Courts will tolerate the regulation of the power so that the Legislature does not by such regulation virtually destroy the efficiency of the Court. It must have just enough power, and will exercise it for its own protection, and it wants and demands no more. And of the question whether the Legislature in its regulation has left sufficient power for the purpose, the court which is called to exercise it must be the exclusive judge, unless its judgment may be reviewed, and in that case the court of last resort would be the exclusive judge. There is no disposition in the court to desire an exercise of this power, and it will not be exercised unless there is a necessity for it. When a judge remembers that he has no right to avenge in this manner individual wrongs, but an injury to the court, the people's court, it becomes a matter of stern and inflexible duty, from the performance of which under his official oath he dare not shrink. For he well knows that as the ermine was spotless when he put it on, the people expect him to leave it as untarnished for his successor. We have been considering whether the Legislature had the right to limit the power of courts created by constitutions. It is very different as to their power over courts of their own creation.

[The court here considers the bearing of the act of 1831 on this case, and held that at the time it was passed, the courts of Virginia existed by virtue of legislative enactment, and were therefore subject to legislative control. Judge Woods prepared this part of the opinion. Judge Johnson then continues:]

That statute that has been handed down and is now in our Code under the changed condition of the State government, might be constitutional now as to the circuit courts, as under the principle before announced it might be deemed a regulation of the power of courts in their punishment for contempts, as it leaves power to the circuit courts by indictments under their own supervision to punish constructive contempts of the character we are considering. Whether such power, under the Code, is sufficient for the protection of said courts we will not now determine, leaving that question to be decided when we are required to do so. Neither is it necessary to decide whether the Legislature could limit the power of this court to punish for constructive contempt, as to us it is evident it has not intended to do so. We would not upon settled principles decide an act of the Legislature to be unconstitutional unless it were necessary. The whole scope of the statute shows that it was intended to apply to inferior courts, and not to the Supreme Court of Appeals. The 28th section provides for the punishment of direct contempts without a jury, so that the fine shall not exceed $50 and the imprisonment more than ten days; "but," it further provides, "the court may in any such a case impanel a jury (without an indictment or any formal pleadings) to ascertain the fine or imprisonment proper to be in-

flicted, and may give judgment according to the verdict." This court can not impanel a jury. It has no machinery to carry out the requirements of the statute, and therefore it is clear to us that the Legislature did not intend it to apply to this court. This court, then, has the unrestricted power, uncontrolled and unregulated by statute, to punish by fine or imprisonment, or both, direct and constructive contempts.

Is the publication complained of here a contempt of this court? It seems to us that the books do not furnish a clearer contempt. It is a contempt, because it charges three of the judges of this court, acting in their judicial capacity, with an offense which, if true, is just ground of impeachment, with an offense calculated to degrade the court, and destroy all confidence of the people therein. If to charge three of the judges of this court to have attended a political caucus and advised a certain action by the caucus, coupled with the promise to the caucus made that as a court they would sustain that action, and then in pursuance of that pledge, made to the caucus more than a year ago, the same judges as a court were about to decide the case then before them as the caucus desired, is not a contempt, then it seems to us that nothing would constitute a contempt. If to charge a court, or a majority of it, of having prostituted their high and sacred trust to base political purposes, is not a contempt, then we may truly say that such a thing does not exist. The article on its face shows, moreover, that it was intended to influence the decision of the court in the cause to which reference is therein made, and which was then pending, or to prevent the court from deciding it at the present term. That it had no such effect is not material, so far as the contempt is concerned. It first says, "The campaign is shaping itself. It leaks out that the Supreme Court of Appeals is to be brought to the rescue in a decision affirming the unconstitutionality of the exemption act, and declaring the supplemental assessment order to be lawful and right. This is, in effect, what was promised by the three Supreme Court judges to the Democratic caucus before the order was issued." Again, "Three out of four judges of the Supreme Court told the Democratic caucus more than a year ago to go ahead and rely on the backing of the court." This is a charge of infamy against the court. But it is further charged that the decision should be hastened by the court against the interests of one of the candidates for nomination for governor, thus again charging the court of using its power for political purposes. Then comes the clause the manifest intent of which was to compel the court to decide against its convictions or not now decide at all, and charging it with being capable of deciding a case, not from its convictions, but as revenue or political desires might dictate. In every aspect of the case the publication is clearly a contempt of this court.

Can such a publication be palliated or excused? Far be it from us to take away the liberty of the press or to the slightest degree interfere with its rights. The good of society and of government demands that the largest liberty should be accorded the press, which is a power and an engine of great good. But the press itself will not for a moment tolerate such licentiousness as is exhibited in said editorial. The press is interested in the purity of the courts, and if it had no respect for the judges on the bench it should respect the court, for after the judges who now fill the bench are only remembered in the decisions they have rendered, the court still remains; it never dies; it is the people's court, and the press as the champion of the people's rights is interested in preserving the respect due to the court.

Have the defendants purged themselves of the contempt? The defendant Frew disclaims all knowledge of the pendency of the suit or that the article was published until he read it in the paper. We think he cannot be entirely acquitted, but that he should suffer a slight punishment. He should not allow the paper of which he is the publisher to indulge in such libelous editorials. The defendant Hart stands on different ground. His answer is a great aggravation of his contempt. He does not express the slightest regret for his act, nor does he exhibit a particle of regard for good order or indicate in any degree appreciation of those great principles that lie at the foundation of good government. By his answer he seems to regard the highest court of the State as a proper subject of libel provided he can by such libelous publications gain a political advantage. He seems to forget that it is the court of the whole people, and can only have their respect as long as it holds their confidence. So far from expressing any regret, he attempts to justify himself by another publication, in another paper, which publication, he said, led him to believe the charge was true, and he felt it his duty to publish it. And he says if this article was libelous, so was that; and further, that one of the judges of this court was an intimate friend of the editor of the other paper, living in the same town, and the court had not denied the truth of that statement. The court had not denied it? The court does not deny any charge made in the papers in reference to it. It can only deny a libelous charge in one way, and that it has done in this case in the only way it ever denies such a charge. Besides, it is very apparent that this article published on the 18th of June is very different from that which purports to have been taken from the Greenbrier *Independent*. It is not even charged that the Greenbrier *Independent* said "three of the judges attended a Democratic caucus, advised its action and promised as a court to back it," and that the court was now about to keep its promise. The answer is a very reckless one, and after all that the defendant swears that "in its publication there was no intention to commit or express a contempt of the court, and no such feeling was entertained by th publishers and editor of the *Intelligencer*."

It will not be accepted as reason for discharging a rule to show cause why the defendant should not be attached for publishing a libel on the court in a newspaper, that the respondent in his answer disclaims any intention to commit or express a contempt for the court. The meaning and intent of the defendant must be determined by a fair interpretation of the language used by him in the libelous article.

As a further excuse he says that the court announced at the time the alternative writ issued in the *mandamus* case, that the respondent must be ready to proceed with the case on the return day and directed the clerk to so inform the defendant; and that he did not, at the time the article was published, know that the law required the assessors' books to be returned before the first of July. He must have known when the article was published that the court had given the respondent six days for preparation after the return day of the writ. He says the court did not announce its reason for the necessity of having the case decided with dispatch. This all shows how ready the defendant was to do the court injustice. Did he have the proper respect for the court, he would suppose they had good reasons for their judicial action, and it is not necessary at all times to give them.

There is nothing in said Hart's answer to palliate his offense, but it is aggravated instead. This is a case in which the court would be justified in both fining and imprisoning C. B. Hart. The contempt is of the most aggravated character. The books fail to show one that is any more so. But a majority of the court is of opinion that the ends of public justice will be attained in this case by the imposition of a fine. For more than a century so far as I know in Virginia but one case of constructive contempt is found in the reports, and none in this State until now. And it is sincerely hoped that another centennial will arrive before the necessity again presents itself. As this is the first case of this character in this State we dislike to be severe. We would gladly discharge the rule if we could. It never would have issued had we dared consult our feelings in the matter. It is the unanimous opinion of the court that an attachment issue against John Frew and C. B. Hart, returnable forthwith.

[From the portion of this opinion relative to the proper penalty to be assessed, Judge Green dissented, and read an opinion in which he announced that in his judgment the defendants should be imprisoned, and that the counsel for the defendants had also committed contempt in alleging in the answer statements which they must have known to be false, and he thought counsel should also have been punished for contempt.]

NOTE.— Constructive contempts are those "not committed in the presence of the court, yet tend to obstruct, embarrass or prevent the due administration of justice therein." Per Judge Thompson in an article to be found in the *Criminal Law Magazine* for March, 1884, p. 173, citing People v. Wilson, 64 Ill. 195; Whittem v. State, 36 Ind. 196, 212; *ex parte* Wright, 65 Ind. 504; Stuart v. People, 3 Scam. 395. The refusal of a witness or juror to obey the process of the court; the refusal of a citizen when lawfully called upon by an officer to assist in executing a warrant or other lawful process; the refusal of a person against whom an officer has a warrant, to submit to an arrest, or the escape of such person after arrest; they attempt on the part of third persons, to prevent an arrest or to procure an escape; an attempt to bribe, intimidate or otherwise influence a juror not to attend court when lawfully summoned; to threaten, intimidate, persuade or bribe or offer to bribe any witness to testify to anything that is not true, or to suppress, or withhold the truth; the forcible abduction of a witness or party with the view or for the purpose of preventing such witness from testifying in any cause pending in any court, to prevent such party from prosecuting or defending any action pending in any court, may be mentioned as some of the cases of constructive contempts. Whittenn v. State, 36 Ind. 196, 213. Removing a slave beyond the jurisdiction of the court pending a petition for freedom, Richard v. Van Meter, 3 Cr. (U. S.) C. C. 214; compare Thornton v. Davis, 4 Id. 500; taking papers from the files of court and refusing to return them, Barker v. Wright Kirby (Conn.) 235; the separation by a juror from his associates and mingling with the community or with persons other than the officers of court, State v. Helvenston, R. M. Charlt. (Ga.) 48; see also, Milo v. Gardnier, 41 Me. 549; Perkins v. Ennel, 2 Kan. 325; Burrill v. Phillips, 1 Gall. (U. S.) 360; Alexander v. Dunne, 5 Ind. 122, 125; Graves v. Monet, 7 Sm. &. M. 45; Oram v. Bishop, 7 Halst. (N. J. L.) 153; holding improper communications with jurors, State v. Doty, 3 Vr. (N. J.) 403; writing an insulting letter to the grand jury, Beig's Case, 16 Abb. Pr. (N. Y.) 266; spiriting away a witness Hackett v. State, 51 Ind. 176, 180; or preventing his attendance at court, Commonwealth v. Feeley, 2 Va. Cas. 1; procuring an insolvent person to act as bail, Hall v. L'Platmier, 49 How. (N. Y.) Pr. 500; or becoming surety under a fictitious name, *Re* Fawcett, 9 Phil. (Pa.) 217; interference with property *in custodia legis* as in possession of a receiver, Secor v. Toledo etc. R. Co., 7 Bis. U. S. 513; King v. Ohio R. Co., Id. 529; Gates v. People, 6 Bradw. (Ill. 386, 383) per Pilsburg, P. J.; Compare Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) 372; Bowery Savings Bank v. Richards, 3 Hun. (N. Y.) 366; s. c. 6 T. & C. (N. Y.) 59; Parker v. Browning, 8 Paige (N. Y.) 388, 390; Sea Ins. Co. v. Stebbins, Id. 565, or of an assignee; Gates v. People, *supra*, or held under mesne process; People v. Church, 2 Wend. (N. Y.) 262; Knott v. People, 83 Ill. 583; People v. Neill, 74 Ill. 68; Compare How v. People, 95 Ill. 169, 172, but not under final process, Gates v. People, 6 Bradw. (Ill.) 383, 388.

It is true that any publication, whether by parties or strangers, concurring a cause pending in court and which has a tendency to prejudice the public concerning its merits and to corrupt or impede the administration of justice or which reflects on the tribunal or its proceedings or on the parties, witnesses or counsel has been held to be punishable as a contempt. Bish. C. L. sec. 216; People v. Wilson, 64 Ill. 195, 213; Hollingsworth v. Duane, Wall. Sr. (U. S.) 77, 102; Bronson's Case, 12 Johns. (N. Y.) 460; Res Publica v. Passmore, 3 Yeates (Pa.) 438; Matter of Shirock, 48 N. H. 428; State v. Morrill, 16 Ark. 384; Matter of Moore 63 N. C. 397; See Henry v. Ellis, 49 Iowa, 205. The grand jury is a part of the court within this rule. Ex parte Van Hook,

3 N. Y. City Hall Rec. 64; Ex parte Spooner, 5 Id. 109; Compare Storey v. People, 79 Ill. 45; Grand Jury v. Public Prees, 4 Brewst. (Pa.) 310; Com. v. Craps. 3 Pa. L. J. 453; s. c. 2 Clark, (2 Pa. L. J.) 184. To charge the judges of a court with indecent conduct in a political compaign is something not very safe; Matter of Moore, 63 N. C. 397. But to criticise a ruling of a court is something punishable only in the criminal courts if any where, State v. Anderson, 40 Iowa, 207; See Dunham v. States, 6 Id. 245; Storey v. People, 79 Ill. 45; Ex parte Hickey, 4 Sm. & M. (Miss.) 751. See Ex parte Robinson, 19 Wall. (U. S.) 505. The act of Congress of Mar. 2 1831 Ch. 99; Rev. Stat. U. S. sec. 725, withdrew from the courts this power to punish libels upon them pending cause. See also Code of Tenn. sec. 4106; State v. Galloway, 5 Coldw. (Tenn.) 326, 329.

EMINENT DOMAIN—MUNICIPAL CORPORATIONS — POWER OVER CONDEMNED PROPERTY.

BELCHER, ETC. CO. v. ST. LOUIS, ETC. CO.

Supreme Court of Missouri, June 9, 1884.

1. Property condemued for one public use can not be appropriated to a different use.

2. A city which has condemned land for wharf purposes, may lease the same to an elevator corporation for the purpose of permitting the erection of an elevator thereon, but it must reserve a control over the building or business, to the end that it may do anything which it might have done if the lease had not been made; if such reservation be not made, the lease is void, as an appropriation of condemned property to private use.

HENRY J. delivered the opinion of the court.

The plaintiff owned in the City of St. Louis, all of City block No 225, and nearly all of block 226. These blocks extend to the Mississippi river, and in 1867, in condemnation proceedings instituted by the city, a portion of the property was condemned, for wharf purposes, and plaintiff was allowed $23993, damages and was assessed, for benefits $2350. The difference between the two amounts was paid to plaintiff, who subsequently acquired all that it owns of block 226 except 30 feet which it owned when the condemnation was had.

In 1871, the city graded the wharf in front of these blocks, and in 1872 riprapped 350 feet of the wharf, but the work was destroyed by high-waters in 1873. On the 8th of August 1879, the city leased to the defendant for twenty years, at an annual rent of $300, all of the property condemned in front of block 226, 319 feet along the river by 90 feet deep. The city charter then in force authorized the city: "To establish, open, vacate, alter, widen, extend, pave, and otherwise improve, all wharfs, to erect docks and wharfs and: "to set aside or lease portions of the unpaved wharf for special purposes, such as the erection of sheds, elevators and warehouses, * * and for any purposes tending to facilitate the trade of the city, but no permit to use any portion of the wharf, or any lease of the same, shall be granted for a term exceeding fifty years. The plaintiff is engaged in the business of refining sugar and owns blocks of land west of those fronting on the river, on which are extensive buildings used in its business.

They receive annually 75000 tons of sugar which is unloaded nearly one mile below their buildings, and this suit is to restrain defendant from erecting a large warehouse on the wharf, which will occupy all of said wharf in front of block 226. That portion of the wharf which was leased to defendant was leased to be used "for erecting and maintaining thereon a shed, or warehouse for the storage and handling of grain, or other merchandise, in connection with the use of its elevator, and * * * to lay railroad tracks on said portion of said wharf, and to connect the same with the tracks of any railroad having the right to lay and operate a track on the wharf or levee."

The plaintiff's bill was dismissed by the Circuit court on the hearing of the cause, and on appeal to the Court of Appeals, the judgment was affirmed, and plaintiff has appealed to this court. Several important questions are discussed in the briefs of counsel, but there is a controlling question in the case which, in the view we take of it, renders it unnecessary to consider any other. It is conceded and the authorities are all in accord on the subject that when private property is condemned, or dedicated, for one public use, it cannot be appropriated to another and different use. The doctrine is tersely stated in the case of Imlay v. Union Branch R. R. Co., 26 Conn. 255, a follows: "Where land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use." In Williams v. The Natural Bridge Plank Road, Co., 21 Mo. 582, the doctrine was concisely announced by Judge Scott, in the following language: "The grant of a right of way for one purpose, will not authorize the use of the road for another and different purpose." Our constitution, where the property in question was condemned, declared: "That no private property ought to be taken, or applied to public use, without just compensation."

The fee simple title was not acquired by the city under the condemnation proceedings, and all the compensation plaintiff received was for the use of his property for a public wharf. If any burden other than that, is to be imposed upon it by the city of St. Louis, the plaintiff must first be compensated for such additional different use. The City of St. Louis has no right to erect a permanent building upon the property condemned except for the use of the wharf, so occupied and of the buildings so erected for legitimate wharf purposes. The Legislature of the State could not authorize any other use of the property by the city, than that for which it was condemned. These elementary propositions we think, will not

be controverted, but the contention is, that elevators and warehouses, in great commercial cities have become necessities for handling grain and other produce, and that the erection and use of such structures, for shipping and unloading produce, upon and from steam boats and other vessels, is not a different use of the property from that for which it was originally condemned. This proposition may be conceded. As was said by Judge Dillon, in the Illinois, &c., Canal Co. v. St. Louis, 2 Dillon, C. C. R. 82: "The extent of the dedication — its scope-remains the same, but the mode of using the property may change, from time to time as the wants of commerce, or the public, may require, and this the dedicator is presumed to contemplate, when he makes the dedication. In order to meet the demands of commerce, and the changed methods of handling grain and other produce, the city may license the erection of elevators, and warehouses, in connection with them, upon the unpaved portion of the wharf without violating the rights of the owners of the fee, but she has no right to lease any portion of it for a term of years without a reservation of the right to cancel the lease whenever it should become necessary to pave and extend the wharf so leased."

It has no right to authorize the erection of such buildings as that which, it is alleged, the defendant is about to erect upon the wharf, without reserving a control over the building, and the uses to which it may be applied. Otherwise, it is but a lease of a portion of the land, condemned solely for public use for wharf purposes, for the private use and private gain of the lessee. The owner of the building may open or close it at his pleasure, and discriminate between shippers and receivers of produce, and make his as strictly a private business as if a retail dry goods merchant were permitted to erect a building on the wharf to conduct his business in. There is no reservation by the city in the lease to defendant, of any control whatever of the building or business. The property is conveyed away from the city for twenty years, and if at any time within that period it should become necessary to extend the wharf and pave it in front of the block in question the needed work could not be done.

The city has no right and can acquire none, from the Legislature, to make such a disposition of the property condemned for wharf purposes, as will prevent her, in the event it becomes necessary to extend and pave the wharf, from doing its duty in that respect. Laws which authorize the taking of private property for public use, should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights, but an imperative public necessity, and the exercise of this right of eminent domain under color of which so many iniquities have been committed, should be held strictly within the bounds prescribed by the constitution and the law.

It will not do to permit property condemned for one purpose to be used for another and different purpose or property condemned for public use to be appropriated to private use. The latter can no more be done than could the property in the first instance have been condemned for such use. The authorities which support the foregoing propositions of law are numerous, but we will content our selves with the citation of the following: Imlay v. Union Branch R. Co. 26 Conn. 255; Williams v. Natural Bridge Plank Road Co. 21 Mo. 582; Rutherford v. Taylor, 38 Mo. 315; Price v. Thompson, 48 Mo. 363; Canal Co. v. St. Louis, 2 Dillon C. C. 82; Pres. Society v. Auburn, etc, R. Co., 3 Hill 567; Trenor v. Jackson, 46 How. Prac. R. 397; Louisville v. Louisville Rolling Mill, 3 Bush. 416; Barclay v. Honell's Lessee, 6 Pet. 31; State v. Laverock, 34 N. J. L. 202; Warren v. Lyons City 22 Iowa 357; Board of Education v. Edron, 18 Ohio St. 225; Barney v. Keokuk, 94 U. S. 324.

The judgment of the Court of Appeals is reversed, and the cause remanded to that court, which will remand it to the circuit court with directions to proceed with the cause in conformity with this opinion. All concur.

CONTRACT — IMPLIED — APPROPRIATION OF ARTICLES.

CHAMBERLAIN v. SUMMIT GAS CO.

Supreme Court of Pennsylvania.

Where one appropriates articles of commerce of another, without the express consent of the owner, but supposing them to have been purchased by a third person on his own account, he is liable to such owner upon an implied contract for the price thereof.

Error to the Court of Common Pleas of McKean county.

N. B. Smiley & George J. Wolf for plaintiff in error; *H. J. Muse & T. A. Morrison* for defendant.

GORDON, J., delivered the opinion of the court:

If the testimony of Chamberlain is to be taken as true, and there is no reason why it should not be so taken, his contract with Risher, as agent of the Empire Oil Company, was that if Chamberlain could not get enough from wells Nos. 1 and 2 to furnish fuel for drilling the well which he had undertaken to put down, he, Risher, would get it from the gas company, but he does not undertake to say that to this arrangement the gas company assented, or that it even had knowledge of it. On the other hand, the uncontradicted proof is, that Risher, instead of ordering this fuel on account of the Empire Oil Company, ordered it for and on account of Chamberlain, saying, at the same time, that Chamberlain had directed him so to do. Now whilst this order did not bind Chamberlain for want of power in Risher to make it, it certainly

did not bind the Empire Company, and it can not be pretended that the plaintiffs could have recovered against it for the gas used by Chamberlain. In the absence, then, of a special contract, they could only recover the value of the gas from the person who had taken and used it. Moreover, Chamberlain very well knew that the gas he was using was not that of his employer, from wells Nos. 1 and 2, for there seems to have been no attempt to get it from that source; on the other hand, he knew that it was being supplied from the plaintiffs' works. We can not, therefore, perceive wherein the court below erred in saying to the jury, that there was a legal implication of a contract on part of the defendant to pay for that which he got and used. How else shall we designate this transaction if it be not an implied contract? The gas was there ready in a pipe at the boiler; it was put there by the plaintiff company, and was designed to be used as fuel for that boiler. The implication thus necessarily arose that whoever used the boiler might use the gas for raising steam. On the other hand, Chamberlain knew that this gas was an article of commerce; that it was there for sale, and that, whilst he had the implied assent of the company to use it, if he did so use it, it must be paid for. When, therefore, he appropriated this article to his own purposes, he, to all legal intents became a party to an implied contract, which could be enforced only by an action of *assumpsit*. But what had the plaintiffs to do with the contract between him and the Empire Company? As we have before said, it does not appear that they even knew of such a contract, and if they had known of it they could not have enforced it. It was Chamberlain's business to see to the execution of his own contract, and if he had to pay for what the Empire Company ought to have paid, he has his remedy against that company; but it would be rather a left-handed kind of justice that would allow him to impose the damages resulting from the breach of that contract upon those who had nothing whatever to do with it. This case is very much as if a city landlord should agree with his tenant to pay for the gas used in lighting the leased premises, and the tenant should endeavor to set up this contract in a suit against him by the gas company. Admitted, that the company was no party to the contract; admitted, that the tenant used the gas; but then the pipes and gas fixtures were already in the premises, and he had but to turn a cock and apply a match. Such a defense would certainly not go very far in a court of justice, and yet it is very much the defense set up here. The Empire Oil Company had agreed with the defendant to pay for the gas which the Summit Company might furnish. The latter company, however, was no party to this arrangement. Chamberlain, without taking the trouble to inquire whether or not his principal had provided for the payment of the gas, took and used it, and now, on the sole plea of its convenience, in that he had but to turn a cock and apply a match, he sets up his contract with the oil company to defeat the plaintiff's claim.

Such a defense is simply good for nothing, and the court below did right in so telling the jury.

Judgment affirmed.

NOTE.—TRUNKEY, J., in delivering his dissenting opinion said: "It is not pretended that there was an express or implied contract between the plaintiffs and defendant; on the contrary, the plaintiffs say in argument that the defendant took the gas without authority, and that they can waive the *tort* and recover in *assumpsit*. But when the defendant went upon the ground he found the connections had already been made, and that gas had been used for drilling other wells upon the premises of the Empire Gas Company. He testifies that said company agreed to furnish gas to him for the work under his contract, and the plaintiffs testify that Risher, the superintendent of said company, spoke to them for the gas. The circumstances indicated to Chamberlain that the Empire Gas Company was furnishing gas according to its contract with him. He did a single piece of work, the boiler and fuel to be furnished by his employer, and there was nothing to warn him that his employer had no right to furnish the gas. Had coal and wood been procured and delivered at the boiler for fuel by his employer, the vendor would have as good right to recover its value of the defendant for the fuel they furnished to the Empire Gas Company. I merely state the facts, most of which are proved by the plaintiffs, and all could have been properly found from the testimony before the jury, as sufficient indication of the reason for my dissent. Instead of directing a verdict for the plaintiffs, the court, I think, should have submitted it to the jury to find whether the defendant was liable to them for the gas he used while working on the premises of his employer."

WEEKLY DIGEST OF RECENT CASES.

1. AUTREFOIS ACQUIT OR CONVICT—KIDNAPPING—ASSAULT AND BATTERY.

An acquittal or conviction of an assault and battery is no bar to a subsequent prosecution for kidnapping, although the two offenses were committed by the same act. *State v. Stewart*, S. C. Oreg. 3 W. C. Rep. 229.

2. BILL TO PRESERVE PROPERTY PENDING ACTION IN STATE COURTS.

A bill in equity cannot be maintained in the Federal courts to preserve the property in controversy, pending an action at law in the State court, when the jurisdiction of the State court has already been invoked for the same end. *Evans v. Smith*, N. S. C. C. D. Col. June 23, 1884, 3 W. C. Rep. 213.

3. CONTRACT—PRIVITY—AGENCY.

The executors of one to whom a promise of life support had been given by A cannot recover from the overseers of the poor, the surplus remaining in their hands of a sum placed in their hands for the support of their testate in fulfillment of the condition of a bond for such support. They were not acting as the agents of the decedent. *Humphrey v. Overseers etc.*, S. C. Pa. 41 Leg. Int. 281.

4. CRIMINAL LAW—REV. ST. SEC. 3894.

The "sending" of letters and circulars concerning lotteries, denounced in sec. 3894 of the Revised Statutes, means the knowingly forwarding or causing to be forwarded through the mail, as matter to be conveyed by mail, *i. e.*, as mail matter, after the prohibited article has been deposited in the mail, and does not include the naked sending towards or to the post-office. *U. S. v. Dauphin*, U. S. C. C. E. D. La., May 12, 1884, 20 Fed. Rep. 625.

5. EASEMENT — RIGHTS IMPLIEDLY RESERVED BY OWNER IN STREET DEDICATED TO A CITY.

The municipal authorities of a town cannot deprive the owner of land, who has simply dedicated to the public an easement to pass over it, of any use of the land dedicated not inconsistent with the full enjoyment of the easement. *Stevenson v. Mayor*, U. S. C. C. E. D. Tenn., April 17, 1884, 20 Fed. Rep. 586.

6. ELECTIONS — INTERFERENCE WITH ELECTORAL FRANCHISE.

The serving of a notice upon persons, warning them that they are not entitled to vote, and threatening them with the legal consequences if they vote, is not an interference with the exercise of the franchise. *Cholette v. Bain*, L. C. Sup. Ct. July 2, 1884; 7 L. N. 220.

7. EQUITY JURISDICTION—POWER TO INTERFERE WITH CRIMINAL PROCESS.

A court of equity can interfere, by an order, with a party conducting a criminal procedure only when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill of equity as to the matter or right affected by or involved in the criminal procedure; but the pursuer and pursued must be identical in the case, *i. e.*, the defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charge must also be the same. As to parties and controversy the inquiry is analogous to that in regard to the plea of *lis pendens*. *Spink v. Francis*; *Williams v. Same*, U. S. C. C. E. D. La. June 2, 1884; 20 Fed. Rep. 567.

8. FRAUD—TEMPORARY ABSENCE FROM STATE—EFFECT OF.

When a resident of this State perpetrates a fraud, some of the acts being committed during a temporary absence from the State, in the contemplation of the law the fraud is committed in this State. *Ex parta Bergman*, S. C. Nev. 4 Pac. Rep. 209.

9. INSOLVENCY—TITLE OF INSOLVENT'S PROPERTY PASSES TO ASSIGNEE ABSOLUTELY.

The title to the property of an insolvent debtor passes absolutely to his assignee, and a foreign creditor has no more right to attach it than a domestic creditor. *Pinckney v. Lanahan*, Md. Ct. App. April Term, 1884; 12 Md. L. Rec. 163.

10. JUDGMENT—ADMISSIBILITY OF IN EVIDENCE—PARTIES AND PRIVIES.

The general rule that judgments and decrees are inadmissible as evidence, except in suits between parties and privies thereto, does not apply to a case where such decree is offered by the plaintiff as a connecting link in a chain of title under which he claims, adverse to that of the defendants. *Wells v. Francis*, S. C. Col. May 2, 1884; 3 W. C. Rep. 217.

11. JURISDICTION—MAIL—TERMINATION OF CUSTODY OF POSTMASTER.

After the voluntary termination of the custody of a letter by the post-office or its agents, the rights of the proprietor are under the protection of the local law, and not that of the United States, and there is no difference in the dominion of the postal laws over a letter before that custody has commenced and after it has ended. *United States v. Dauphin*, U. S. C. C. E. D. La. May 12, 1884; 20 Fed. Rep. 625.

12. JURISDICTION OF CIRCUIT COURT—CITIZEN OF THE DISTRICT OF COLUMBIA.

The jurisdiction of the circuit court does not extend to a controversy between an alien and a citizen of the District of Columbia, the latter not being a citizen of a State within the meaning of the acts conferring jurisdiction upon the circuit courts. *Land etc. Co v. Elkins*, U. S. C. C. S. D. N. Y. June 7, 1884; 20 Fed. Rep. 545.

13. JURISDICTION OF FEDERAL COURTS—DEEDS OF ASSIGNMENT.

A United States circuit court may entertain jurisdiction of a bill to set aside as fraudulent a deed of assignment at suit of a resident of a State other than that of the assignor and assignee, when the amount involved exceeds $500. *Fletsher v. Greenwald*, U. S. C. C. N. D. Iowa, June 23, 1884; 20 Fed. Rep. 547.

14. LICENSE—REPAYMENT.

When a license is cancelled the court should direct repayment *pro tanto* of the amount paid for the same for the unexpired time. *Lydick v Korner*, S. C. Neb. May 27, 1884; 20 N. W. Rep. 1.

15. LOTTERY—FOREIGN BONDS.

The plaintiff claimed to recover double the amount paid by him for a bond which was one of a series issued by the Austrian Government for the purpose of obtaining a loan of money, the holder, under the terms of the loan, being entitled to receive his principal and interest and a premium of twenty per cent., and what was termed a prize, if by the drawing provided for he became entitled to it. Provision was made for the drawing of the bonds by a division into series, and the drawing of a certain number of series tickets, to be deposited in a wheel; and by the drawing of these and of the prize numbers from another wheel, the numbers which were entitled to prizes were designated. The prizes varied from 600 guilden to 200,000 guilden. *Held*, That this did not constitute a lottery scheme, and was not in violation of the Constitution and laws of this State, prohibiting lotteries. *Kohn v. Kaehler*, N. Y. Ct. App. June 24, 1884; 26 D. Reg 41.

16. MUNICIPAL CORPORATIONS—MANDAMUS—JUDGMENTS FOR TORT.

Mandamus will issue to compel a municipal council to make and levy a general rate for the purpose of satisfying a judgment obtained against the municipal corporation in an action of negligence. *Wilson v. The Shire of Oakleigh*, S. C. Vict. April 30, 1884; 5 Australian L. T. 195.

17. NEGLIGENCE — DUTY TO VOLUNTEERS — WHO ARE.

One who goes upon a ship to see a friend off, is not a volunteer within the rules governing the duty of such owner to keep the ship and the passages thereto secure. *Trice v. Clarence, etc. Co.* S. C. N. So. Wales, May 12, 1884; 5 Australian L. T. 191.

18. PARTNERSHIP — EXEMPTION OF PARTNER'S PROPERTY FROM FIRM DEBTS.

The debts of a co-partnership may be enforced against property owned by the firm, be it real or personal, without regard to the rights and liabilities of the partners, and a partner cannot hold it exempt therefrom. *Van Staden v. Kline*, S. C. Iowa, June 12, 1884; 20 N. W. 3.

19. PATENT LAW—DESIGN—FIGURES IN RELIEF—PHOTOGRAPHS.

The prominent claim in a patent design being figures in relief, a photograph of the design, since it does not show the relief, does not sufficiently describe the design in the absence of a minute description in the specifications. *Untermeyer v. Jeannot*, U. S. C. C., S. D. N. Y., June 6, 1884, 20 Fed. Rep. 503.

20. PRACTICE AND PROCEDURE—VERDICT—SUFFICIENT EVIDENCE TO SUPPORT PRESUMED.

Where a bill of exceptions does not purport to contain all the evidence in a case, it will be presumed that there was sufficient evidence produced upon the trial to support the verdict. *Barnes v. Mich. etc. Co.*, S. C. Mich. June 25, 1884, 20 N. W. Rep. 36.

21. PRACTICE — SETTING ASIDE EXECUTION SALE AND DEED ON MOTION.

After a sale under execution, and the time for redemption has expired, and the sheriff has made a deed to the purchaser, the execution sale and deed cannot be set aside on motion. *Jenkins v. Merriweather*, S. C. Ill. June 19, 1884; 16 Chic. L. N. 349.

22. PROMISSORY NOTE—FRAUDULENT CONSIDERATION—AGREEMENT FOR DIVORCE—COLLUSION.

A promissory note given by a wife to her husband as part of the consideration of a transfer of property from him to her, is void, when the remainder of such consideration was an agreement on the part of the wife to abandon her defense in an action of divorce then pending between them, and doing nothing to prevent or delay him in obtaining a decree of divorce. *Beard v. Beard*, S. C. Cal. June 28, 1884; 3 W. C. Rep. 208.

23. REMOVAL OF CAUSES — ESTOPPEL — TRIAL OF ONE OF TWO SUITS IN STATE COURTS.

The trial of one of two suits upon the same cause of action in the State court, after the right of removal of both to the Federal court has been established, estops the party from insisting upon the removal of the other. *Evans v. Smith*, U. S. C. C. D. Cal., June 23. 1884; 3 W. C. Rep. 213.

24. SHERIFF—LIABILITY FOR SEIZURE OF GOODS.

A sheriff who rightfully took property from a person under process, in an action of replevin, and delivered it to the plaintiff in that action, simply discharged his duty, and cannot, therefore, be held liable for the property, or its value and damages, at the suit of the defendant in that action. His recourse is to the plaintiff therein. *Fleming v. Wells*, S. C. Cal. June 17, 1884; 4 Pac. Rep. 193.

25. STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.

A promise made to a debtor upon sufficient consideration to pay his debt to his creditor is not within the statute of frauds. *Green v. Estes*, S. C. Mo. June 16, 1884.

26. SURETYSHIP—STATE DEPOSITARY—DEPOSITS—DUE RETURNS—FAILURE TO REMOVE.

The sureties on the bond of a bank designated as a State depositary are not relieved from liability because his principal did not make returns to the governor strictly according to law, or because the governor did not remove or discontinue the principal as a depositary. *Mathis v. Morgan*, S. C. Ga. May 13, 1884; 18 Rep. 44.

27. SURVIVAL OF ACTIONS—ACTION FOR DOWER—GROSS SUM.

The filing by a widow in an action for the recovery of dower of her consent to accept a gross sum in lieu thereof, and her death before the ascertainment of such sum abates it, and her representatives have no power to revive it. *McKeen v. Fish*, S. C. N. Y. May 29, 1884; 26 D. Reg. 105.

28. WARRANTY—DEFENCE TO ACTION.

A plea in an action for goods sold and delivered that the goods were not of quality equal to the warranty is bad unless it states that they were of no value at the time that they were delivered. *McMillan v. Sampson*, S. C. Vict. April 30, 1884; 5 Aust. L. T. 193.

29. WILL—CONSTRUCTION.

Where the father of six children, made a will, giving all his property to his six children, and upon the birth of another child made a codicil, providing that the property should be divided among his children, except A, "and her share shall go to B," his seventh child, B took only one sixth not two-seventh, and the other five each one-sixth. *Reynold's Appeal*, S. C. Pa. 41 Leg. Int. 283.

QUERIES AND ANSWERS.

QUERIES.

10. B a trustee under a deed in trust for C for life, remainder to her surviving children at her death, with power in B with consent of C to sell the land and reinvest the proceeds, sells the land to D who gives his note only, which is accepted by C. About two years afterward, it having been represented to her that the trade was a cash trade and a good one, D sold to E, both having full notice of trust. E sold to F who probably had only the constructive notice, derived from the record. F sold to G who had full notice. C now disapproving of the sale conveys to her children, and they sue for the estate. Can they recover? J. A. B.

Atlanta, Ga.

QUERIES ANSWERED.

Query 6. [19 Cent. L. J. 89] A promissoy note contains the phrase "with attorney's fee." The stipulation is unconditional. When will attorney fees, unconditionally stipulated for, mature and become payable? P. L. H.

La Porte City, Ia.

Answer. In 15 Cent. L. J. p. 139, a similar question to this one was asked, (Query 18) and on page 179 of the same volume two answers were given. The query under consideration and the one referred to raises the same legal proposition. The answers in 15 Cent. L. J., 179, we must beg leave to say, do not, in our opinion, state the law in regard to the matter. Upon a thorough investigation of the subject, at the time the query in 15 Cent. L. J. was asked, we found that the question, as a whole, had never been judically passed upon by any court of last resort, except that perhaps it be in a Louisiana case. The conclusion is reached by applying all the cases upon the subject of attorney's fees. The answer to the query as to when attorney's fees, unconditionally stipulated for, matures and becomes payable, is made up of three parts, which are as follows: 1. A suit must be brought upon the note. 2. It must be brought by an attorney. 3. At the time the suit is brought there must exist a necessity for so doing. An examination of the cases will show that if one of these elements be wanting that such fees as are considered will not be payable. In Churchman v. Martin, 54 Ind. 380, a dictum, uncontroverted by any absolute decision bears us out in our statement. Smith v. Silvers, 32 Ind. 321, was decided when the Indiana statute did not prohibit, in effect, a conditional stipulation, but we refer to it as discussed by Chief Justice Worden and applied and made a part of Churchman v. Martin, on page 387. We grant that Smith v. Silvers, *supra*, was upon a note which contained a stipulation conditional, but the court in passing judgment upon a stipulation unconditional, refers to and quotes the case of Smith v. Silvers as being an exponent and showing the meaning of such unconditional stipulations; that is to say, the unconditional stipulations intend and mean the same as the conditional—the only difference being that in one the condition is not expressed. "A stipulation whereby the debtor agrees to be liable for reasonable attorney's fees," says the court in Smith v. Silvers, *supra*, "in the event that his failure to pay the debt shall compel the creditor to resort to legal proceedings to collect his demand, is not only, not usurious, but is so eminently just that there should be no hesitation in enforcing it." Here the "reasonable attorney's fee" indicates the work of an attorney; "shall compel" means necessity, and "legal proceedings" means more than dunning or writing letters. The *dictum* in Churchman v. Martin is as follows: "Perhaps there would be an implied condition in the note we are now considering, that the attorney's fees were only to be paid in case it became necessary to employ an attorney to collect it." Attorney's fees, pre-supposes attorney's services. Bullock v. Taylor, 39 Mich. 137. We quote the *syllabus* of Churchman v. Martin: "A clause of a promissory note promising to pay a certain per centum attorney's fees, unconditionally is valid, and in a suit upon such note, the judgment must include such percentage." Arguing from this, negatively, we take it that if there be no suit there can be no judgment and consequently no fees. To fix such fees as are regarded in this query the facts must be heard by the court and the amount judicially determined. The court in Woods v. North, 84 Pa. St. 407, says that it is "not a sum necessarily payable. The phrase collection fee necessarily implies this. Not only so, but this amount of percentage can not be arbitrarily determined by the parties." See 4 *Southern Law Review*, 793. These decisions mean that unless there is a suit there can be no fees, because a court must determine the amount of such fees, and it can not be possible that a debtor be compelled to resort to a court in order to determine how much he owes. If such fees are mature and payable before a suit is brought, they must of necessity become due at the same time that the principal of the note matures. If such fees are due upon the maturity of the principal, they become payable to the payee—personally, and because the payee and maker contracted for that additional sum regardless of the necessity. (2.) In support of the proposition that the suit must be brought by an attorney, see cases as follows: Churchman v. Martin, 54 Ind. 380; Woods v. North, 84 Pa. St. 407; Patterson v. Donner, 48 Cal. ——; Brown v. Blanchard, 40 Mich. 61; Sclater v. Cotton, 3 Jur. (N. S.) 630. (3.) For cases supporting the proposition that a necessity must exist at the time of bringing the suit, see all the cases before cited and the following: Alexandria v. Saloy, 14 La. Ann. 327; Collar v. Harrison, 30 Mich. 66; Myer v. Hart, 40 Mich. 517. In Alexandria v. Saloy, *supra*, the defendant instituted executory proceedings for the recovery of the note, and the sum of $70 attorney's fees, which the plaintiff had stipulated in the act of mortgage to pay in the event the note should not be paid at maturity. There were other questions in the case but in regard to this the court says: "We do not understand the stipulation to mean that the plaintiff should pay the attorney's fee in the event a suit should be necessary for the collection of the note." The stipulation was by the written contract made mature at maturity of note, but the court says that that is not what it means; that the stipulation is mature when a suit is necessary. In Alexandria v. Saloy a suit was brought and by an attorney, but the court says there was no necessity for so doing, and therefore the fees did not mature.

Danville, Ind. M. W. HOPKINS.

RECENT LEGAL LITERATURE.

COOLEY'S BLACKSTONE, Commentaries on the Laws of England in four books. By Sir William Blackstone, Knight, one of the Justices of the his Majesty's Court of Common Pleas, together with a copious analysis of the contents and notes, with references to English and American decisions and statutes to date, which illustrate or change the law of the text; also a full table of Abbreviations and some considerations regarding the study of the law. By Thomas M. Cooley, Professor of Law and Political Science in the University of Michigan, and Author of Constitutional Limitations. In two volumes. Third Edition, Revised, Chicago; Callaghan & Co., 1884.

The learned editor believing that the time has come for discarding altogether the notes of the English editors and substituting matter more especially important to American practitioners and students, prepared this edition of the immortal work of Blackstone under that conviction. That work can never be cast aside, so long as we live under the common law. We may throw away our Coke and refer in contempt to the works of the great commentators which preceded him, but we can never dispense with the lectures which were produced by the beneficence of Mr. Viner. They are worshipped no less by the practitioner than by the student, and a *dictum* of Blackstone is as eagerly seized by a book-lover to-day as in the days of the commentator himself. It is well that

his works are made American by one so competent as Judge Cooley and there is no excuse for any lawyer not having these two volumes on his shelves within his arm's reach. They are well printed and bound.

LEGAL EXTRACTS.

SMALL CLIENTS AND SMALL CASES.

Young attorneys often affect a contempt for petty cases and bring every opportunity of business to the same sort of test which they might, perhaps, sensibly apply after they had been years successfully at the bar; but in all the earlier years of practice, if we rightly appreciate the experience of the most successful men at the bar, there is no case too small to succeed in, or, at least, too small to be worth succeeding in.

A young man does not enter the business of a great client by the main portal. If he has an opportunity to enter, it is usually by some side door of a trifling collection or an uninviting piece of business, given to him, perhaps, as a feeler, to try his pluck and persistence as well as his knowledge and skill.

Nor is a minor service for a great client always more desirable business than a similar service for some insignificant client. The enthusiastic appreciation of a poor man for a service, trifling in itself, may exercise more influence than the unexpressed satisfaction of a great client at a matter which he counts, after all, of no great moment.—*Daily Register.*

QUALIFIED OFFERS.

The distinction between letters constituting only a contract and letters constituting only a negotiation, was the main question in Moulton v. Kershaw (Supm. Ct. Wis., January, 1884; 18 Northw. Rep. 172), where it appeared that defendants wrote to plaintiff, saying that they were authorized to offer salt in car load lots, at a certain price, and they should be pleased to receive his order. Plaintiff answered by telegram that defendants might ship him two thousand barrels, "as offered in your letter."

The court pointed out that no limit was put as to amount in the offer, other than that it should be not less than a car load, and that it was not just to construe such a general communication of authority to offer merchandise at a specified price, without specifying any restriction in quantity, into an offer to furnish any quantity whatever which the person receiving the offer might order.

The court concede that if the offer had been to sell plaintiff all the salt he would order, at the price and on the terms named, they would have been bound to deliver, at least, any reasonable amount; but held that the letter in question being not an express offer to sell, so much as a statement of the fact that they were authorized to offer, they were not liable for not filling the order.—*Daily Register.*

NOTES.

——To a newspaper man brevity is the soul of wit; to a lawyer a brief is the soul of wealth.—*Ex.*

——When a client settles with his lawyer he generally finds out what law and fee-sick means.

——And now we hear that a New Hampshire lawyer has just died of starvation. He must have sued somebody himself.

——It's a very mean act in a divorce lawyer to follow a wedding party to church for the purpose of distributing his cards.

——New York's noted shark-fisherman is dead. His business was not to catch lawyers; it was the other sort of sharks that he used to haul in.—*Ex.*

——A couple of Virginia lawyers were about to go out and shoot each other, when some silly person interfered and had them arrested. Their fellow members of the bar passed some touching resolutions of regret.

——A lawyer at the Chicago bar was recently held for contempt of court for simply making a motion before the judge. Perhaps we may as well explain that the motion looked towards throwing an inkstand at the justice's head.

——A bill has passed at least one branch of Congress for the increase of salaries of the Federal District judges. So long as the Federal courts possess the jurisdiction they do at present, they should receive proper salaries, and the increase to $5,000 gives them a salary in no sense flattering. This parsimony in paying judges small saleries is bad policy. It often results in placing "poor timber" upon the bench, and then the people complain of the quality of the bench. An able lawyer will not relinquish his lucrative practice, the excitement of the bar, the fascination of active life, unless he has financial inducements. There was a time when it was the height of a lawyer's ambition to gain a seat upon the bench. Now lawyers of ability, of fame, and of popularity, pass their lives away without giving the subject a serious thought. The former days were those when good, solid, indisputable law was declared; now, it is the common thing for even a layman to doubt and attack a judicial decision. What is the cause of this change? Is the laity asserting itself, and the populace becoming tired of lawyers and judges?

——In consequence of a threatening letter having been received by Mr. Justice Denman, who is now sitting in the Chancery Division for Mr. Justice North, who is on circuit, a detective has been placed in that court to watch any suspicious movements on the part of strangers. Referring to the above mentioned threat, the *St. James' Gazette* observes: "Any stick, says the proverb, will serve to beat a dog; and it appears to be the opinion of some persons that any missile will do to hurl at a judge. None can have forgotten the egg which Vice-Chancellor Malins happily avoided, and which he supposed 'must have been meant for his brother Bacon;' and now one Mary Cawley (thirty-three times convicted) has been throwing a clog at the Accrington bench of magistrates, whereby the chairman was struck on the breast. The most notable story of the kind in our judicial annals is thus given by L'Estrange: 'Judge Richardson, in going the Western Circuit, had a great flint stone thrown at his head by a malefactor, then condemned (who thought it meritorious, and the way to be a benefactor to the commonwealth, to take away the life of a man so odious); but leaning low on his elbow, in a lazy, reckless manner, the bullet flew too high and only took off his hat. Soon after, some friends congratulating his deliverance, he replied by way of jest, * * * * 'You see, now, if I had been an upright judge' (intimating his reclining posture), 'I had been slain.' "—*Law Times.*